

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION III

No. 34984-5-III

STATE OF WASHINGTON, Respondent,

v.

CALEB TOWNSEND, Appellant.

APPELLANT'S REPLY BRIEF

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Federal Cases

Morrissey v. Brewer, 408 U.S. 471, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972).....2

State Cases

State v. Nelson, 103 Wn.2d 760, 697 P.2d 579 (1985).....1

State v. Stegall, 124 Wn.2d 719, 881 P.2d 979 (1994).....1

I. ARGUMENT

The State concedes that Townsend had a due process right to a hearing before the court found a violation of his plea agreement, but argues that he waived that right even though he denied committing the violation. *Respondent's Brief*, at 11. But the State, not Townsend, has the burden of proving a knowing, intelligent, and voluntary waiver of a constitutional right. *State v. Stegall*, 124 Wn.2d 719, 724, 730, 881 P.2d 979 (1994). Every reasonable presumption against waiver is indulged, and silent acquiescence alone is insufficient to show a choice that comports with minimum constitutional requirements. *Id.* at 730.

The State's reliance on *State v. Nelson*, 103 Wn.2d 760, 697 P.2d 579 (1985) to support its argument that Townsend waived his right to a hearing is misplaced. *Respondent's Brief*, at 12. In *Nelson*, a hearing was held in which both parties presented affidavits in support of their positions, and neither party objected to the hearsay contents of the affidavits. 103 Wn.2d at 762. As such, *Nelson's* primary consideration was whether the introduction of hearsay evidence at the revocation hearing without an objection from the defense deprived the defendant of due process at the hearing. This is a substantially different question from the question whether the defendant was required to be afforded an evidentiary hearing at all.

At a minimum, due process requires an opportunity to be heard in persona and to present witnesses and documentary evidence, to confront adverse witnesses, a neutral decision-maker, and a written decision by the fact-finder identifying the evidence relied upon and the reasons for finding grounds to revoke. *See Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972) (discussing due process requirements for parole revocation proceedings). The required hearing

must be the basis for more than determining probable cause; it must lead to a final evaluation of any contested relevant facts and consideration of whether the facts as determined warrant revocation. The parolee must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation.

Id. at 488.

Here, at the inception of the sentencing proceeding, the State informed that court that it was aware there was no agreement that the plea deal had been violated. RP 18. The State also acknowledged that Townsend was innocent until proven guilty of the new charges and indicated it would not object to waiting for the outcome of the new matter before deciding on the violation. RP 22. After hearing argument on the applicable burden of proof, the trial court proceeded to immediately rule that Townsend committed the violation based upon the probable cause

statement. RP 26. No inquiry was made into whether Townsend wished to testify or to call any witnesses on his own behalf, or whether he waived those rights. Having a due process right to these opportunities, the court was not entitled to deny them to him without first ascertaining that he knowingly, intelligently, and voluntarily waived them.

The State devotes a substantial portion of its briefing to defeating the straw man argument that “the lack of confrontation is the defendant’s main complaint,” contending that a failure to object on confrontation grounds waives the error. *Respondent’s Brief*, at 14-20. But this characterization of Townsend’s argument is wholly inaccurate and readily belied by the numerous references throughout the Appellant’s Brief to Townsend’s right to present evidence on his own behalf, as well as the complete absence of any reference to cross-examination, confrontation, or use of hearsay anywhere therein. *See, e.g.*, Appellant’s Brief, at 1 (Assignment of error refers to “opportunity to rebut the State’s allegations,” Issue 2 refers to “a due process right to a hearing with an opportunity to present evidence”); 4-5 (“due process requires an evidentiary hearing at which the defendant has the opportunity to contest the State’s allegations”); 7 (referring to Townsend’s “right to contest the State’s accusation and to a hearing “to dispute the State’s charges”); 8 (“the trial court may not find a breach of a plea agreement without

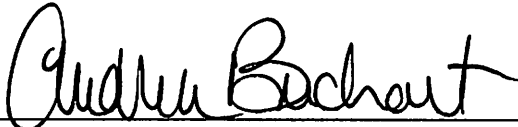
providing the defendant with an opportunity to present evidence contesting the violation”).

Indeed, while Townsend certainly possessed a right to cross-examine State’s witnesses as part of the panoply of due process rights to which he was entitled at the hearing, the Appellant’s Brief does not once specifically reference a confrontation violation or challenge on confrontation or hearsay grounds the use of the affidavit supporting the new charges. What Townsend has plainly argued is that, regardless of the State’s evidence, he had a right to present his own, including but not limited to his own testimony denying the new charge. *See* RP at 28. The trial court neither gave him this opportunity to exercise this right, nor ascertained that he waived it. The process was, therefore, constitutionally deficient, and its result must be reversed.

II. CONCLUSION

For the foregoing reasons, Townsend respectfully requests that the court REVERSE his sentence and REMAND the case.

RESPECTFULLY SUBMITTED this 3rd day of August, 2017.



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DECLARATION OF SERVICE

I, the undersigned, hereby declare that on the 3rd day of August, 2017, I served a copy of the foregoing Appellant's Brief by e-mail, pursuant to prior agreement of the parties, to the following:

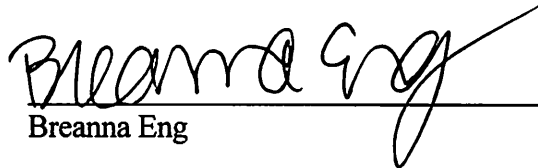
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And by depositing a copy in the U.S. Mail, first-class, postage pre-paid, addressed as follows:

Caleb Townsend
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Spokane, WA 99260

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed this 3rd day of August, 2017 in Walla Walla, Washington.


Breanna Eng

BURKHART & BURKHART, PLLC

August 03, 2017 - 2:11 PM

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Appellant's Reply Brief

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